UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

HOGAN TRANSPORTS, INC.

and **Cases 03-CA-107189**
03-CA-111193

TEAMSTERS LOCAL 294,
INTERNATIONAL BROTHERHOOD
OF TEAMSTERS

and **Case 03-CA-108968**

MANSFIELD TEETSEL, an individual

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General Counsel
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Bruce Bramley, Esq., Counsel for the
Charging Parties

DECISION

Statement of the Case

Raymond P. Green, Administrative Law Judge. I heard these consolidated cases in Albany, New York on September 24, 26 and 27 and December 17 and 18, 2013. The charge and the amended charge in 03-CA-107189 were filed by the Union on June 14 and 24, 2013. The charge in 03-CA-108968 was filed by Mansfield Teetsel, on June 12, 2013. The charge in 03-CA-111193 was filed by the Union on August 14, 2013. The Consolidated Complaint that was issued on August 30, 2013, and amended at the hearing, alleged as follows:

1. That on or about June 11, 2013, the Respondent by Charles Johnson and Tom Lansing, interrogated employees about their union activities.

2. That on various dates between June 11 and early July 2013, the Respondent by David Hogan, Charles Johnson and Tom Lansing threatened employees with job loss if they selected the Union.

3. That on June 17, 2013, the Respondent moved the employees' work location in order to discourage union or protected activities.

4. That on or about July 1, 2013, the Respondent gave a wage increase to its employees in order to discourage them from engaging in union or concerted activities.

5. That on or about July 6, 2013, the Respondent, for discriminatory reasons, discharged Mansfield Teetsel.

6. That on or about July 8, 2013, the Respondent blamed the Union for trying to take away the wage increase granted on July 1, 2013.

7. That the Union requested recognition on June 3, 2013 after it had obtained a majority of the Respondent's employees in a unit of all full-time and regular part-time drivers employed at the Respondent's West Coxsackie, New York location, excluding guards, professional employees and supervisors as defined in the Act.

8. That because of the unfair labor practices described above, the Respondent has made a fair election impossible and that a bargaining order is an appropriate remedy.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

Findings and Conclusions

I. Jurisdiction

It is admitted and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(1), (6) and (7) of the Act. It also is admitted and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practice

Hogan Transport is engaged in the trucking industry. Its headquarters are in St. Louis, Missouri and its President is David Hogan. (A descendent of the person who founded the company, 93 years ago). Unlike a typical common carrier, Hogan provides what is called "dedicated customer services." This means that Hogan enters into contracts to provide exclusive trucking services for particular customers on a local or regional basis. In this case, Hogan is the dedicated service provider for a company called Save-A-Lot which is a retail chain of discount supermarkets. Save-A-Lot has a number of distribution centers, but the one involved in this case is located in West Coxsackie, New York. In order to perform its services, Hogan maintains a facility next to the customer's warehouse and it employs a group of drivers who transport food stuffs from Save-A-Lot's West Coxsackie distribution center to its retail Stores in the Northeast. [2] This means that these Hogan employees only transport goods for Save-A-Lot. It also means that Hogan's only customer in this geographic area is Save-A-Lot. Hogan's workforce at this location consists of about 29 drivers. Its nationwide workforce includes about 1300-1400 drivers.

There was testimony that Hogan is not the only company that provides dedicated trucking services to various customers. Its principle competitors are J.B. Hunt, Swift

[1] During the hearing, the Respondent objected to certain documents being turned over to the General Counsel based on attorney-client and/or attorney work product privileges. Counsel also objected to the trier of fact, (me), being the person to review these documents in camera on the grounds that if they were deemed to be excludable, they nevertheless might unduly influence the person deciding the case. I agreed and with the consent of Judge Fish, the documents were submitted to him for in camera inspection and ruling. I am attaching his Order to this Decision as Appendix A.

[2] On occasion, the drivers located in Coxsackie will take goods from that distribution center to another Save-A-Lot distribution center located in Austinburg, Ohio.

Transportation, Werner, U.S. Express, and Snyder. All of these companies, which apparently do not have collective bargaining agreements, employ many more truck drivers than Hogan.

Jim Lauda is the Operations Manager at the West Coxsackie facility and he reports to Charles Johnson, the Director of Operations. Tom Lansing, a Vice President, is also involved in this case. As noted above, David Hogan is the company's president.

It seems that about three years ago, there was a previous failed attempt by a union to organize the truck drivers at the West Coxsackie location. At that time, Charles Johnson visited the facility and was in some way involved in that campaign.

The Union's organizing drive started in May 2013. The primary employee involved in this effort was Robert Sansone who also intended to leave the company in June. Sansone solicited union authorization cards from his fellow employees and he was assisted in this process by James Young, Mansfield Teetsel, Steven Ianno and Timothy Mabee. An initial meeting between union representatives and employees was held on June 2.

On June 3, 2013, the Union filed an election petition in Case No. 3-RC-106334 with the Board's Albany office. Simultaneously, it delivered a letter requesting recognition on behalf of the West Coxsackie drivers. Thus, the Respondent became aware of union activity amongst its employees no later than June 3.

By June 3, 2013, the Union had obtained signed cards authorizing union representation from 14 employees. Thereafter, from June 7 to June 13, the Union obtained cards from four other employees. The parties stipulated that there were 29 drivers who comprised the appropriate unit. Thus, the evidence shows that by June 13, the Union had obtained signed authorization cards from 18 employees.

With respect to the authorization cards, I note that Bob Sansone, who signed a card on June 7, resigned from the company on June 14. With respect to Mansfield Teetsel, who signed a card on May 10, the Respondent asserts that he resigned before June 3, whereas the General Counsel contends that Teetsel changed his mind and that the Respondent, for discriminatory reasons, decided to accept his resignation. Employees Brian Pennick, Antonio Rogers and June Glennon all signed union cards before June 3 but they retracted their cards in August 2013.

During the week of June 10, Charles Johnson came to the facility in order to talk to the employees on an individual basis. (Obviously for the purpose of dissuading them from voting for the Union). The question here is whether his conversations stayed within, or crossed the line of legality.

James Young testified that when Johnson approached him he asked Johnson; "What's up?" According to Young, Johnson replied; "What's going on?" When Young said, he didn't know, Johnson said that the Union had filed a petition and that if the Union comes in, Save-A-Lot was already prepared to bring in a third party carrier. According to Young, he understood this to mean that if Save-A-Lot terminated its contract with Hogan, the drivers would lose their jobs.

Virgil Smith testified that he had a conversation with Johnson who said that Save-A-Lot did not want the union, that Hogan didn't want the union and that if they did go union, the drivers would probably not have jobs because Save-A-Lot would throw them out.

Robert Sansone testified that when he met Johnson at the facility, he was asked what he thought was going on. According to Sansone, he replied that the company was not paying enough and that the benefits were sub-par. Sansone states that he told Johnson that he was soon going to leave the company so this didn't affect him one way or the other, but that the company wasn't treating the other employees right. Sansone testified that later in the day, he overheard Johnson tell employee Bill Gates; "You know Bill, if they get the Union in here … the Company will lose the work at the Save-A-Lot Coxsackie location."

Sansone left the company on June 14, 2013.

Steve Ianno testified that he spoke to Johnson and Tom Lansing and that Johnson asked him; "How did we come to this? What's going on? Why are we back here again?" Ianno states that he responded; "It's the same old story that a lot of guys are not happy. All the favoritism. Things that have been going on. It's been three years and you've done nothing about it." According to Ianno, Johnson said; "You know Save-A-Lot doesn't want the Union here. We don't want the Union here." Ianno testified that Tom Lansing interjected by saying; "You know, if the Union comes in then … all you guys are going to be out of work. Where are you going to be?" Ianno nonplused, replied he didn't care because there was a company right up the road that would hire him right away. "If you want to pull out, go ahead."

Shane McDonald testified that he had just returned to work when he had a conversation with Johnson who welcomed him back to the company. He states that Johnson told him that he wanted to give an update on what was going on; that a petition had been filed and he wanted to explain the company's position. According to McDonald, Johnson said that Save-A-Lot is a non-union company that did didn't want to do business with anybody that has anything to do with a union. McDonald testified that Johnson said that he thought that this would put our contract with Save-A-Lot at risk and that there was a possibility that you could lose your job if we lose that contract. According to McDonald, Johnson said; "What do you think about this whole thing? McDonald responded that he had just gotten back and didn't even know what was going on.

Alan Field testified that he too had a conversation with Johnson within this time period. His testimony was, however, somewhat confused. Although he related that a part of the conversation dealt with Save-A-Lot's contract with Hogan and the possibility that Save-A-Lot could hire a new carrier, it is not clear from his testimony whether he or Johnson brought this possibility up.

On June 13, a Stipulated Election Agreement was signed and an election was scheduled for July 12, 2013. It is agreed that as of June 13, there were a total of 29 drivers who worked at the West Coxsackie facility.

On June 15, the Respondent notified the drivers that instead of reporting to the property of Save-A-Lot, they had to check in and park their vehicles across the street on a property owned or leased by Hogan. David Hogan explained that when the election petition was filed, Save-A-Lot was told of it and he suggested that the trucking operation be moved across the street so that there would be no possible disruption of Save-A-Lot's operations in the event of a labor dispute. John Gerber, Save-A-Lot's Executive Vice President, agreed and the move was made. Although there was some testimony that the lot across the street had some pot holes, was a bit dirtier and more congested, it seems to me that the effect of this move on the drivers was insignificant. To the extent that this is alleged as a violation of the Act, I recommend that it be dismissed.

Virgil Smith testified that on June 18, he had another conversation with Johnson who told him that the drivers were going to get a raise on July 1. Smith testified that he had not heard anything about a raise before this conversation.

On June 19, 2013, management held three meetings with employees to discuss the union situation. These meetings were arranged at different times in order to cover all of the drivers. James Young made a recording of the meeting that he attended and a transcript was introduced into evidence. The employees who testified as to the other two meetings, basically related the same types of statements. The main speaker for the company was James Hogan. There were two themes that were emphasized during these meetings. First, the probability that if the union came in, Save-A-Lot would terminate the contact at Coxsackie and the drivers could lose their jobs. The second point was that the employees would be receiving on July 1, a 2 cent per mile increase in their compensation. In the latter regard, this would amount to between a $40 to $60 increase per week. In pertinent part, the transcript reads;

> I can tell you Save-A-Lot made this clear to me, we don't have any transportation providers who will deliver to our stores in the country that are union so they said you need to keep in mind when you guys are working through the issue here. I don't know how to be – I don't know how to be more direct, but I think our business here is in jeopardy if the union comes in, It's not a threat, it's just my opinion with my discussions with Save-A-Lot when they remind me of how they operate. They don't want to operate in union environment, all that stuff.
>
> Employee: "If we go union, we're all out of a job."
>
> Hogan: "I agree 110% with that and I am just being honest with you."
>
> If its organized here I think Save-A-Lot goes in a different direction. And you know, I think we can do a great job for Save-A-Lot but let's face it, we are not irreplaceable.
>
> I have said a lot about Save-A-Lot today. I'm not here to bash Save-A-Lot because again they could easily pull the business from us at any time. Over the years they have that right for whatever reason. It's one of our longer term customers. But again they have always made it clear the environment they want to work in. And they said what's this about the Union? And when they select their carrier that's always one of the questions they ask. So you know, they're concerned about it. When they hear about drivers talking about work stoppages, that doesn't go over well. Again, my opinion is we got to continue to work together because if you guys organize there is a strong possibility we lose the business. I do not want anyone to tell me two months down the road why didn't you mention that to us.

At the June 19 meeting, a number of employees asked questions including Wayne Teetsel. Basically, he complained that when he returned to the company, (after a hiatus), he was hired as a new employee at the mileage compensation rate that is given to new drivers. He stated; "You want people to be loyal, which I'm still [am] you know… but that makes me bitter. I mean, I can see you keeping me down to the bottom for a year; it's going on two years now. So it makes you real bitter."

On June 24, 2013, the Union held a meeting with employees and they decided to file an unfair labor practice charge and to cancel the upcoming election.

On June 29, a document was handed out announcing an increase of 2 cents per mile effective on July 1. This stated:

> We are pleased to announce that the 2 cent per mile increase that was announced earlier this month is in effect starting 7/1/13. Please understand however, that the Teamsters have challenged Hogan's ability to give this increase and they have asked the National labor Relations Board to seek an injunction forcing Hogan to rescind it. [3]

With respect to this announced increase, I note that there was nothing said at the June 19 meeting and there is nothing in the notice to indicate that this wage increase had been planned or decided upon before the Union filed the election petition.

On or about July 5, Teetsel, who had previously notified Lauda that he had gotten another full time job, told Lauda that he had changed his mind and that he wanted to keep his full time job at Hogan. Lauda told Teetsel that this would be fine because he hadn't yet filed his papers in St. Louis. Lauda also told Teetsel that he shouldn't do this again, because he might not have a job to come back to.

On July 6, Teetsel was informed that the company had accepted his resignation notwithstanding his change of mind.

Tom Lansing testified that he made the decision to not accept Teetsel's change of mind because he thought that the company would be better off with a new employee who would appreciate the job instead of Teetsel who had resigned once before. Lansing also testified that it was common knowledge that Teetsel was bitter about his pay. It therefore would be surprising if the company did not consider that Teetsel would likely be voting in favor of the Union in the election that was scheduled for the following week. (July 12). Thus, accepting Teetsel's resignation would mean one fewer vote for the union.

On July 8, the company held a meeting with its employees at Red's restaurant. Basically, the remarks made here were the same as at the previous meeting held on June 19. In substance, Hogan told employees that it was his strong opinion that if they went union, Save-A-Lot would terminate the contract and the employees would lose their jobs. A recording of this meeting has Hogan making the following statements:

> Somebody asked at the end of the last meeting well, what can the Union do for us and what would change if the Union got in here? And I said well, you know, first of all, any wages or benefits, we have to agree to any changes in the wages and benefits. The Union can't just arbitrarily change them; get them all that stuff. But to me that's all a moot point, because I think again, if the Union comes in here I feel like there's probably not much to talk about because there won't be jobs. We've got one customer here and that customer, in my opinion, is going to go down the road and find an alternative solution.

[3] The Union had filed a charge that alleged, in part, that the Respondent had promised wage increases in order to dissuade employees from joining or supporting the Union.

At this same meeting, the company distributed to the employees, a leaflet that read in part:

> As you know, the [NLRB] will be conducting an election on Friday, July 12 at which you will be asked to decide whether or not you wish to be represented by Teamsters Local 294. As I have already explained, I think that having the Teamsters here would be one of the worst things that could happen to Hogan employees. In my opinion, the Teamsters cost employees money and put employees' jobs at risk by making companies inefficient…
>
> Many people without realizing the mistake they were making signed Teamsters authorization cards. Just because you signed a Teamsters' card does not mean you have to vote for the Teamsters. You are perfectly free to vote against the Teamsters, even if you signed a card. Now is the time to clear up your mistake by voting NO!
>
> I think that everyone eligible to vote should take advantage of that opportunity. It is not enough to just stand by and do nothing. Don't let a few people decide your future and that of Hogan. Give the Teamsters a clear message and vote NO!

In August, 2013, several employees indicated to company supervisors or managers that they wanted to retract their union authorization cards. The testimony regarding these conversations was basically that the employees were told that they could contact either the Union or the NLRB. They were then given a piece of paper that had the names, addresses and phone numbers of the Union and the NLRB. To me this doesn't amount to illegal conduct and I recommend that this allegation be dismissed. *R.L.White,* 262 NLRB 575, 576 (1982).

The recitation of events described above does not fully disclose the Respondent's position on these allegations and I will address its arguments and the facts relevant thereto in the Analysis Section of this Decision.

III Analysis

a. Predictions v. Threats

In the present case, the evidence shows that the principle message that management conveyed to its employees was that its only customer in the area was Save-A-Lot; that this customer was non-union and operated with non-union carriers at other locations; and that if the employees chose union representation there was a high likelihood that Save-A-Lot would cancel its contract with Hogan thereby causing the employees in Coxsackie to lose their jobs. The company's management and supervisors were careful to couch this message in terms of what could happen and were careful to state that this is what they believed the customer would do if the employees voted for the Union. No-one on behalf of management told the employees that Hogan would cease operating the facility if the employees voted for the union or that the Respondent would discharge employees for supporting the union. The closest thing to a definitive statement was when an employee at the June 19 meeting stated that if the employees went union, "we're all out of a job," and David Hogan replied that he agreed 110%.

The Respondent elicited testimony from its witnesses to the effect that Save-A-Lot was, except for one franchise store, a non-union operation that used non-union carriers throughout the United States.[4] As an example of Save-A-Lot's expressed hostility to unionization, the Respondent cited an incident back in 1992 when that company subcontracted transportation work at its St. Louis distribution center when the employees at that location unionized. Hogan also testified that back in 2003, when employees at Save-A-Lot's Lansing Michigan distribution center starting unionizing, he was told that they , (Save-A-Lot), had a plan to close that facility and combine it with another facility, "depending on how far the organizing attempt goes." Based on these comments and the fact that Save-A-Lot basically operates in a non-union environment, the Respondent contends that its management had a reasonable basis to believe that Save-A-Lot would terminate its contract with Hogan if Hogan's employees voted for the Union.

The General Counsel points out, and it is conceded, that no one from Save-A-Lot ever actually told any representative of the Respondent that the contract would be cancelled if the employees went union. Moreover, the evidence shows that no one from the Respondent chose to ask. And I suspect that the reason they didn't ask is because if the wrong answer was given, it would constrain the Respondent from making the "predictions" that are the subject matter of this case.

There has been a great amount of spilled ink and substantial disagreement about where to draw the line between what is an illegal threat of job loss and what is merely an opinion regarding the consequences of unionization. If statements are construed as a threat of job loss or plant closure, they would violate Section 8(a)(1) of the Act. If merely an opinion or reasonably based prediction, such statements would be protected by Section 8(c) of the Act.

The main case on this subject is *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1968) in which the Supreme Court stated;

> It is well settled that an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effect he believes unionization will have on the company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control.

Because the test for legality may depend on a statement's context and whether it is based on "objective fact," It is therefore possible for the same words to be either legal or illegal. That is, one cannot predict that a statement of this sort will be legal, simply by looking up words or phrases in a form book.

There have been a number of cases dealing with employer statements in the context of organizing or election campaigns, where employees were told of the possibility, probability or certainty that a major customer(s) would cease doing business if they chose to be represented by a union.

[4] The General Counsel showed however, that Save-A-Lot's parent corporation, operates a number of supermarkets which have unionized employees.

One of the cases cited by the Respondent is *TNT Logistics North America*, 345 NLRB 29 (2005). In that case, the employer during pre-election speeches, told employees that its main customer didn't like unions and that the company could lose its contract if the employees voted for the Union. A majority on the Board concluded that these statements were predictions and not threats. They stated:

> Our colleague says that "nothing in the record substantiates the prediction" that Home Depot would cancel its contract with the Employer if the Employer's employees voted to unionize. We disagree. The uncontroverted facts are that (1) Home Depot does not like using unionized carriers; (2) Home Depot does not use any unionized carriers; and (3) the Employer's contract with Home Depot would expire in October 2005. Although there was no certainty that Home Depot would not renew its contract with the Employer if the Employer's employees voted for unionization, we think that the above unrefuted facts furnished an ample basis for a reasonable prediction that Home Depot would so act.
>
> Furthermore, even assuming, as our dissenting colleague contends, that Haynes' prediction had some threatening aspect when uttered to Cook on May 26, it would have lost this aspect the very next day, when General Manager Gundlach—an official of higher authority than Haynes—indicated to employees, including Cook, that it was not certain that Home Depot would terminate it's relationship with the Employer, if the employees unionized.

The Respondent also cites *Curwood Inc.*, 339 NLRB 1137 (2003), a case in which the employer, in a letter, told employees:

> Being unionized is also viewed negatively by our customers. They are concerned about potential work stoppages and product interruptions, which would harm their business. That is why we say remaining union-free affects our business and our livelihood.

In deciding that the employer in *Curwood* did not violate the Act, a majority on the Board concluded that the statement constituted a legitimate prediction instead of a threat of reprisal. The Board stated:

> In conveying its customers' concerns about possible unionization, the Respondent's June 30 letter contained no threat of reprisal. Furthermore, the Respondent provided objective material reflecting its customers' concerns…. The material consisted of written inquiries from large customers such as Nestle, Nabisco, Kraft, and Minute Maid, asking whether the Respondent's products were produced in unionized plants. Some of the inquiries specifically raised concerns about "possible interruption in receipt of materials" and "continuity of supply" in the event of a work stoppage. Contrary to the judge, the fact that the Respondent's customers also sent similar letters to other suppliers cuts against the violation finding, not in favor of it. That the Respondent's customers routinely and generally ask their suppliers about their contingency plans in the event of union-related supply disruptions underlines just how much of a concern such disruptions really are for those customers.
>
> The Board's decision in *Tri-Cast, Inc.,* 274 NLRB 377 (1985), makes clear that the Respondent's statement here was lawful. In *Tri-Cast*, the employer told

> employees that if, as a result of unionization, it had to bid higher or customers felt threatened because of strikes, the company would lose business and jobs. The Board found that the employer had accurately represented what others outside its control might do….
>
> The facts in the instant case militate even more strongly against finding the Respondent's statement unlawful. In *Tri-Cast*, supra, the employer had not actually received concerns from customers. Here, the Respondent received expressions of concern from various customers.
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> Seeking to distinguish *Tri-Cast*, our dissenting colleague emphasizes that the employer there phrased its statements in terms of what its customers *might* do if employees unionized. But *Tri-Cast* does not stand for the proposition that the *only* permissible statements about customer loss are those expressed in the conditional. In *Tri-Cast*, the employer reasonably talked about what its customers might do because it had not actually received concerns from customers. Here, the Respondent had received such concerns, and, thus, reasonably dispensed with the conditional mood.

On the other hand, the General Counsel cites a number of other cases, some more recent, where the Board has found similar statements to constitute 8(a)(1) threats. See *UPS Supply Chain Solutions*, 357 NLRB No. 106 (2011) at page 3; *DTR Industries Inc*., 350 NLRB 1132 (2007); *Contempora Fabrics, Inc*., 344 NLRB 851 (2005); *Adworth Co. & Dunking Donuts Mid-Atlantic Distribution Center*, 338 NLRB 137, 142-143 (2002); and *Holly Farms Corp*. 311 NLRB 273, 300 (1993).

In *UPS Supply Chain Solutions*, 357 NLRB No. 106, the employer told employees that some of its contracts required that it maintain a nonunion work force and that the employees could lose their jobs by supporting a union because the Respondent could lose those clients. The Board stated inter alia:

> The judge found lawful [the] statements regarding the possibility of job loss due to client contracts requiring the maintenance of a nonunion work force, because the statements were couched in terms of business necessity and did not imply that the Respondent would terminate employees simply for voting in favor of the Union. Contrary to the judge, we find that the statements … were unlawful… At the hearing, [she] could name only one client that allegedly imposed such a contractual provision. She was, however, unfamiliar with even the general terms of that contract and admitted a general lack of knowledge of any of the Respondent's current client contracts, including the named client. Moreover, it is impossible to determine whether the contract of the named client actually provides support for [her] claim, because the Respondent failed to offer it into evidence. In short, because the record does not provide objective support for [her] prediction or, alternatively, indicates that, at most, only one named client had a contract that required the Respondent to remain nonunion, [her] statement that multiple clients' contracts require a nonunion work force was overbroad, unsupported by objective fact, and therefore not protected as a lawful expression of opinion under Section 8(c).

In *DTR Industries Inc*., 350 NLRB 1132 (2007), the Board held that similar statements were violative of the Act because the employer had not shown that they were based on objective considerations. It stated:

> In *DTR Industries v. NLRB*, supra, the Sixth Circuit, inter alia, reversed the Board's finding that in a pre-election letter to employees, the Respondent's then president, Yuji Kobayashi, unlawfully threatened plant closure. Reviewing the 4-page letter, the court determined that Kobayashi provided an objective context and explained the reasons why he believed customers who had been using the Respondent as their sole source for parts "were likely to split their business in order to have an alternative supply source in the event of a strike." The court reasoned that because the letter explained that Kobayashi's perspective was based upon his industry experience and knowledge of the Respondent's customer base, he was entitled to make those statements. The court held that once an employer provides such rationale, the violation can be found only if it is shown that the prediction falls outside Section 8(c) as either not objective in nature or untruthful. Absent evidence that the statements in the letter were subjective or false, the court concluded that no violation of the Act had occurred.
>
> In this case, by contrast, the statements provided no objectively-based rationale. Employee Rita McVetta testified that King said that if the Union got into the plant, customers "wouldn't probably do business with us and we wouldn't have jobs." This mirrored the substance of McVetta's affidavit, which referred to a statement that "customers would not want to deal with us because of the Union." Testifying about another of King's meetings, employee James Lehman said King told them they "would lose sole supplier source from Honda and Toyota and if this happened there would be a reduction of jobs"; that if customers became concerned about the reliability of DTR's production flow, they "would look for other sources" which "would mean there would be less work and fewer jobs at DTR." Finally, employee Daniel Gahman testified that King said, "if the UAW was to get into DTR we would lose that sole supplier status," and with customers allowing other companies to compete with DTR to provide parts, "it would result in layoffs" and DTR's longstanding no-layoff policy "would have to change." Thus, based on the credited testimony of these employees, the consistent message of King's remarks was that unionizing would result in the Respondent's loss of customers and a decrease in business, leading inevitably to the loss of work and the jobs. Unlike the earlier case, where the context and basis for Kobayashi's prediction were part of his remarks, King's statements offered no support for his prediction. In these circumstances, we find that the Respondent unlawfully threatened employees in violation of Section 8(a)(1). (Footnotes omitted).

These cases illustrate a divergence of views about where to draw the line for determining whether a statement constitutes a permissible prediction versus a threat of reprisal. Of course, from the perspective of a "reasonable" employee, such statements, whether based on "objective" facts or not, would no doubt be viewed as cautions that voting for a union would probably result in the loss of their jobs. That is, unlike those of us in the legal profession, employees as lay people, are not so adept at counting angels on the heads of pins.

In my opinion, the statements in the present case were not supported by objective evidence. The assertions of management that they knew of Save-A-Lot's hostility to unions were based on statements allegedly made at least 10 years ago. In this case, when the Respondent made Save-A-Lot aware of the union's organizing drive, Save-A-Lot's management merely indicated that it would be happy to assist the Respondent. They did not say that if the

Union won the election, Save-A-Lot would terminate the contract. In fact, it is admitted that no one from the customer ever told anyone from the Respondent that the contract would be cancelled if the employees chose the Union. At most, Respondent was told that Save-A-Lot was concerned about the possibility of future work stoppages. Moreover, if cancellation of the contract was a real concern to the Respondent, it could have asked but chose not to. In short, the statements made by Respondent's representatives to the effect that unionization would probably cause Save-A-Lot to cancel the contract were, in my opinion, mere speculation and were not based on objective facts. As such, it is my opinion that this case is more closely analogous to the cases cited by the General Counsel and I conclude that these statements, made individually by management to employees or in the meetings held on June 19 and July 8, 2013, violate Section 8(a)(1) of the Act.

b. Promising and Granting a Wage Increase

Wage increases or other benefits granted upon the advent of a union organizing campaign, (assuming the Employer is aware of it), creates a presumption that they are granted to influence employees to withhold their support for unionization. *Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB 1339, 1344 (2000); *B & D Plastics*, 302 NLRB 245 (1991); *Speco Corp*., 298 NLRB 439, 443 (1990). To rebut this presumption, an Employer must establish a legitimate explanation for the timing of the grant of benefits and this usually consists of evidence that they were part of an existing practice *or* that they were planned beforehand. *NLRB v. Exchange Parts Co*., 375 U.S. 405 (l963); *Baltimore Catering Co*., 148 NLRB 970 (l964). An employer cannot grant benefits when an election is pending without facing the presumption that it has violated the Act.

Moreover, even where benefits have been previously planned, an employer may violate the Act if the timing of the announcement is designed to influence an election. *Mercy Hospital Mercy Southwest Hospital*, 338 NLRB 545 (2002).

The Respondent asserts that the increase in mileage compensation, (a wage increase), that was formally announced on June 19 and became effective on July 1, had been planned before the election petition was filed.

The last group of wage increases that were given to employees at any location occurred more than three years ago. Because of the Great Recession, the company decided to halt any further wage increases until economic conditions improved. For example, in 2009, despite the terms of the existing contract, Save-A-Lot basically forced the Respondent to lower its rates for the services provided. Thus, the company did not have an existing practice of granting wage increases on a regular basis.

The Respondent claims that in the Spring of 2013, it faced at various of its facilities, labor shortages, in part caused by the wage rates being offered to existing and prospective drivers. That is, current drivers were leaving for other jobs, (as in the case of Teetsel), and job applicants were hard to find. The testimony was that a decision was made between Mr. Hogan and Dave Stock to start giving wage increases at various locations throughout the country. The first increases were given in St. Louis on May 1, 2013. The next wage increases were respectively given in Austinburg, Ohio on June 1; Fulton Missouri on June 5; and Indianapolis, Illinois on June 29. As described above, the wage increase for the Coxsackie employees was announced on June 19 and was implemented on July 1. Also on July 1, the employees at Lexington, NC received an increase. Employees at five other locations received wage increases from July 11 through October 1, 2013. Although employees at most locations, including Coxsackie received an increase of 2 cents per mile, some locations received different amounts.

I have no doubt that the Respondent began to seriously consider wage increases for employees at its various facilities before May 2013, and therefore before it became aware of the union organizing drive at Coxsackie. This is demonstrated by the fact that employees in St. Louis received a 2 cent per mile increase on May 1, 2013 and the employees at Austinburg received a somewhat different raise on June 1, 2013. Not so convincing is its claim that the Respondent decided, before the election petition was filed, to give a raise to the Coxsackie employees, or that it made a decision regarding the amount to be given, or when it would be implemented.

The Respondent provided no documentary evidence to support its claim that the decision to grant a wage increase to the Coxsackie employees was made before the petition was filed. (June 3, 2013). To the extent that there are documents relating to this wage increase, one is an e-mail dated May 4, from facility manager Lauda to Johnson stating that one of his drivers told him that increases had been given to the Austinburg drivers. The heading of the email states; "Austinburg raises?" The other document is one prepared by Johnson on June 13, 2013 setting forth three possible increases, (from 1 cent to 3 cents per mile), and their cost to the company.

Therefore, the decision as to how much of an increase would be given to the Coxsackie employees was made on or after June 13, almost two weeks after the petition had been filed.[5] Accordingly, as I conclude that a decision had not been made regarding the amount of any wage increase to the Coxsackie employees before June 3, when the petition, was filed, I find that this wage increase violated Section 8(a)(1) of the Act.

The General Counsel contends that the Respondent also violated the Act by telling employees that the Union had challenged increase and had asked the National Labor Relations Board to seek an injunction forcing Hogan to rescind it. It is, of course true, that the Union did file an unfair labor practice charge alleging that the announced increase violated Section 8(a)(1) of the Act. But it is also true that a typical remedy for this type of violation does not require a company to rescind a wage increase already given.

The General Counsel cited some cases where the Board found violations in circumstances where companies, for anti-union reasons, threatened to withhold expected wage increases or changed existing conditions, and then blamed the union for their own actions. See for example *Valerie Manor Inc*., 351 1306, 1317. (2007) and Cen*tre Engineering, Inc.* 253 NLRB 419, 421 (1980). But those cases are distinguishable. In *Valerie*, the company told employees that it was going to withhold a scheduled wage increase because the union had filed an unfair labor practice. The threat to withhold a scheduled raise because a union files a charge with the Labor Board is, by itself, a violation of the Act. By blaming the Union for its own violation of the law, the employer was adding insult to injury. In *Centre Engineering*, the employer told its employees that it was withholding a scheduled wage increase because of the pending election. The employer did not tell the employees that it was deferring the increase in order to avoid the

[5] Before the decision was made to give the Coxsackie employees a raise, the Respondent, at this location, implemented $500 and $1000 bonuses to be given to employees who referred new full-time or part-time drivers. Also, it offered a $4000 sign up bonus for new drivers. These bonuses were offered and given because by the start of 2013, the driver complement at Coxsackie was understaffed and management was having difficulty recruiting and retaining drivers.

appearance of election interference; instead blaming the union for its unlawful withholding of the expected wage increase.

This is not the case here. The communication truthfully announced that the Union had filed charges with the NLRB challenging the legality of the increases. At most, it may have misrepresented the remedy that would be appropriate in the event that a violation of the Act was found. In my opinion, this does not rise to the level of unlawful interference. I therefore recommend that this allegation be dismissed.

c. Mansfield Teetsel

Teetsel had previously worked at the West Coxsackie facility from 2004 to 2011. At that time, he resigned and got another job.

In December 2011, he asked to be rehired and was rehired, but as a new employee at a lower pay rate than what had previously received. Although not the main union activist, Teetsel did solicit union cards from two other employees.

As noted above, at the June 19 meeting, Teetsel stated that he was bitter because he was hired at a lower rate when he returned to work.

In June, Teetsel accepted another job and told Lauda about it. He also testified that he told Lauda that he wanted to continue to work for Hogan on a casual basis when he was available. To me, this is tantamount to a resignation by Teetsel of his full time driver's position.

On or about July 5, Teetsel told Lauda that he had changed his mind and wanted to remain employed on a full-time basis. He testified that Lauda responded that his papers hadn't yet been submitted so this was fine, but that Teetsel shouldn't do this again because he might not have a job.

On July 6, Teetsel received a phone call from Lauda informing him that his resignation had been accepted.

Lansing who testified that he made the decision to accept Teetsel's resignation, said that he did so because he thought the company would be better off with a new employee who would appreciate the job instead of Teetsel who had resigned once before. Lansing also testified that it was common knowledge that Teetsel was bitter about his pay.

As of July 6, 2013, the Respondent admits that it did not have, at the Coxsackie location, enough truck drivers to efficiently perform the services required for the Save-A-Lot account. Moreover, this situation was a chronic one that went back at least to the start of 2013. At the time that Teetsel's resignation was accepted, the company was advertising for truck drivers, was offering new drivers a $4000 bonus and was offering bonuses to any employee who referred a new driver.

I don't buy the company's explanation for refusing to allow Teetsel to remain on as a full-time driver. Perhaps if there was not such a pressing need to hire new drivers and retain its existing work force, it would have made sense to allow Teetsel to resign for a second time. But in this case, I believe that Lansing figured that Teetsel would likely be voting in favor of the Union in the election that was scheduled for the following week. (July 12). Thus, accepting Teetsel's resignation would mean one fewer vote for the union. Accordingly, I conclude that by the de facto discharge, the Respondent violated Section 8(a)(1) & (3) of the Act.

d. Interrogation or Greeting

The General Counsel alleges that on several occasions in June, the Respondent's agents interrogated employees about their union support or activities. All of these incidents involved Charles Johnson, either alone, or with Tom Lansing.

As previously noted Johnson and Lansing visited the Coxsackie facility a week after the petition was filed in order to speak to the employees and to present the company's views on unionization. In doing so, they basically approached and spoke to each employee on an individual basis. The primary message was the possibility or probability that choosing the union would cause the Respondent's only customer in the area to terminate its contract. (Discussed above). Johnson's last visit to this site occurred three years before when there was a previous union organizing drive. From the employees' point of view, there was no surprise as to why Johnson was there. This obviously was not a casual visit nor was it about something other than the union campaign.

The evidence presented by the General Counsel's witnesses does not indicate that Johnson or Lansing directly asked employees about the union. Employees were not asked if they signed union cards. They were not asked if they supported the union. They were not asked how they felt about the union. The approach was indirect and in some cases would be indistinguishable from a typical greeting such as, "what's up?"

Mansfield Teetsel credibly testified that on June 10, Johnson approached him and said; "How's it going?" Teetsel replied that he was thinking about leaving the company and that Johnson asked him not to leave. According to Teetsel, Johnson introduced him to Lansing and they spoke about how trucking had gotten harder and how the company would like to give Teetsel a raise but couldn't because "of that," pointing to the NLRB poster. According to Teetsel's testimony, he told Johnson that he couldn't say who was going to join the union and that Johnson said; "Well, that's fine."

Robert Sansone credibly testified that on or about June 10, Johnson came out to greet him and said; "what do you think about what's going on?" He states that he replied; "Charlie, I don't know where you've been for three years…" Sansone testified that after that opening he was a bit sarcastic with Johnson and they spoke about wages and other benefits that he felt were lacking.

Steven Ianno credibly testified that on June 11, he was approached by Johnson and Lansing who asked to talk to him. According to Ianno, Johnson said; "What's going on? Why are we back here again?" Ianno states that he told them that it's the same old story; that a lot of guys are not happy and that it's been three years and the company hadn't fixed anything.

James Young credibly testified that Johnson asked to speak to him and he asked Johnson; "What's up?" Young testified that they went outside where Johnson said: "What's going on?" He responded that he didn't know and again asked Johnson; "What's up?" According to Young, Johnson said that the union had filed a petition and he told Johnson that he didn't know anything about it. (This sounds a bit like the dialogue in an Abbot and Costello movie). Following this interchange, Johnson told Young that if the Union came in, Save-A-Lot was prepared to bring in a third party carrier.

Shane McDonald credibly testified that in June, he had a conversation with Johnson in the hallway and that Johnson said he wanted to introduce himself and welcome McDonald back.

He states that Johnson said that he was glad to have him back, that he hoped that everything was going well and that he wanted to give McDonald an update about what was going on. According to McDonald, Johnson said that a petition had been filed by a union and proceeded to talk about the relationship between the Respondent and Save-A-Lot. McDonald states that after some further discussion about the possibility that the drivers could lose their jobs, Johnson asked; "What do you think about this whole thing?" McDonald replied that he just got back to work and didn't know what was going on.

Alan Field testified that on June 13, he had a conversation with Johnson and that he told Johnson that his family were members of a Union. (There is no indication that he was asked). Field also testified that he told Johnson that it was his opinion that Save-A-Lot was non-union and that they could just hire another carrier to replace us. From what I can gather from Field's testimony, Johnson didn't say much if anything because Field had apparently already adopted the company's view on the matter. (By June 13, Johnson had already met with many of the other drivers).

Under Board law, not all interrogations are automatically considered to be coercive. *Rossmore House*, 269 NLRB 1176 (1984). See also *Bourne v. NLRB*, 332 F.2d 47 (2nd Cir. 1964). In the Board's view of the law, interrogation of employees will violate the Act if, considering the totality of the circumstances, it is deemed coercive. *Rossmore House Hotel* 269 NLRB 1176 (1984) aff'd sub nom, *Hotel & Restaurant Employees Local 11, v. NLRB*, 760 F2.d 1006 (9th Cir., 1985); *Sunnyvale Medical Clinic* 277 NLRB 1217 (1985); Raytheon Co., 279 NLRB 245 (1986). In *Bloomfield Healthcare Center*, 352 NLRB 252, the Board stated:

> The test for whether an unlawful interrogation occurred is "whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act." *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), enfd. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). The Board considers such factors as whether the interrogated employee is an open or active union supporter, the background of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of the interrogation. Id.; *Stoody Co.*, 320 NLRB 18, 18–19 (1995). The Board has held that questioning employees about whether they attended a union meeting and what occurred at the meeting is an unlawful interrogation. *Resolute Realty Management Corp.*, 297 NLRB 679, 685 (1990), and cases cited therein.

In my opinion the conversations between Johnson, Teetsel, Young and Field do not constitute unlawful interrogations. The statement by Johnson to Teetsel; "how's it going?" is, in my opinion, simply a normal greeting and cannot be construed as an illegal interrogation. And the exchange of "what ups" between Johnson and Young do not, in my opinion, warrant the conclusion that Young was being interrogated about the union.

On the other hand, I am going to conclude that the conversations with McDonald, Sansone and Ianno crossed the line. In context, they could reasonably be construed as inquiries into the employees' union activities. Moreover, because I have already concluded that the statements regarding the possible cancellation of the Save-A-Lot contract should be deemed as coercive, these interrogations coupled with the Save-A-Lot comments, are also deemed to be coercive.

e. Is a Bargaining Order Warranted?

In *NLRB v. Gissel Packing Co*., 395 U.S. 575 supra, the Supreme Court distinguished between three categories of situations insofar as the propriety of granting a bargaining order to remedy an employer's unfair labor practices. The first category involved the "exceptional" case where "outrageous" and "pervasive" unfair labor practices are committed. The second category involves "less pervasive practices" that have a tendency to undermine majority strength and impede the election process. As to this second category, the Court held that a bargaining order would be proper to remedy an employer's unlawful conduct which had the effect of making a fair election unlikely where at some point the Union had majority support amongst the employees. The third class of cases, concern those where minor or less extensive unfair labor practices have been committed which would have a "minimal impact" on an election. The Court held that in the third category of cases, a bargaining order would be inappropriate to remedy an employer's unfair labor practices.

The first thing to consider is whether the Union ever obtained majority status within an appropriate bargaining unit. In this regard, the evidence shows that the Union, having obtained 14 signed cards authorizing the union to bargain on behalf of employees, did not obtain a majority by the date, (June 3), that it demanded recognition and filed an election petition with the Board. Nevertheless, four additional cards were signed between June 3 and June 13. (I note that Sansone quit on June 14). Inasmuch as it was stipulated that the unit consisted of 29 truck drivers, the Union had reached majority status by June 13,[6] the date that parties executed a Stipulated Election Agreement. Moreover, this majority status would not be affected by the disaffection of three employees, who in August, tried to get their cards back. This is because it reasonably could be concluded that they were motivated, at least in part, by the unfair labor practices committed by the Respondent in June and July.

The next question is whether the unfair labor practices found to have been committed are sufficiently serious to make the holding of a fair and free election improbable. I think the answer is yes.

The Respondent, in my opinion, crossed the line and essentially threatened employees with job loss by indicating, without an objective basis, that its sole customer at West Coxsackie would terminate its contract with the Respondent and thereby cause all of the jobs to be lost. Second, I have concluded that the Respondent promised and granted a substantial wage increase in order to dissuade the employees from voting for the Union in the upcoming election. Third, it is my opinion that the Respondent effectively discharged Mansfield Teetsel, an active union supporter, because it believed that he likely would vote for the Union. And finally, but less seriously, I have concluded that the Respondent coercively interrogated some of its employees.

In *Stevens Creek Chrysler Jeep Dodge, Inc*. 357 NLRB No. 57, enfd. by the D.C. Cir. on December 14, 2012 under the name *Mathew Enterprise, Inc. v. NLRB,* the Board held that a bargaining order was warranted under similar circumstances. The Board stated inter alia:

> Threats of job loss and plant closure are “hallmark” violations, long considered by the Board to warrant a remedial bargaining order because their coercive effect tends to “destroy election conditions, and to persist for longer periods of

[6] Even if we don’t count Sansone’s card, the Union had obtained 17 other cards, which is more than half of 29.

time than other unfair labor practices." *Evergreen America Corp.*, 348 NLRB 178, 180 (2006) (citing, inter alia, *Gissel*, supra, 395 U.S. at 611 fn. 31), enfd. 531 F.3d 321 (4th Cir. 2008).

The Respondent then discharged Rocha, whom it perceived to be the leader of the organizing effort. This, too, is a "hallmark" violation, perhaps the most flagrant, "because no event can have more crippling consequences to the exercise of Section 7 rights than the loss of work." *Mid-East Consolidation Warehouse*, 247 NLRB 552, 560 (1980). In *NLRB v. Jamaica Towing*, *Inc.,* 632 F.2d 208, 212–213 (2d Cir. 1980), the seminal case defining "hallmark violations," the Second Circuit Court of Appeals noted, in enforcing the Board's Order, that the discharge of an active union adherent would likely "have a lasting inhibitive effect on a substantial percentage of the work force," and would remain in employees' memories for a long time.

The Respondent committed a third hallmark violation later in the organizing campaign by awarding eight employees wage increases on May 14. Grants of wage increases have long been held to be a substantial indication that a bargaining order is warranted because they have "'a particularly long lasting effect on employees and are difficult to remedy by traditional means not only because of their significance to the employees, but also because the Board's traditional remedies do not require a respondent to withdraw the benefits from the employees.'" *Evergreen America*, supra, 348 NLRB at 180 (quoting *Gerig's Dump Trucking*, 320 NLRB 1017, 1018 (1996)); see also *Pembrook Management*, 296 NLRB 1226, 1228 (1989) (discussing cases in which bargaining orders were given based solely on the grant of wage increases).

In my opinion, the violations in this case would make a fair election unlikely. Therefore, because the Union obtained majority status by June 13, 2013, I am going to recommend the granting of a Gissel bargaining order effective on that date.

Conclusions of Law

1. By threatening employees with the loss of their jobs because they joined or assisted Teamsters Local 294, International Brotherhood of Teamsters, the Respondent has violated Section 8(a)(1) of the Act.

2. By promising and granting wage increases in order to dissuade employees from supporting the Union the Respondent has violated Section 8(a)(1) of the Act.

3. By interrogating employees about their union membership or support, the Respondent has violated Section 8(a)(1) of the Act.

4. By effectively discharging Mansfield Teetsel because of his union support, the Respondent has violated Section 8(a)(1) and (3) of the Act.

5. Because the Union obtained majority status by June 13, 2013 and the violations found above have made a fair and free election improbable, a bargaining order effective retroactive to June 13, 2013 is an appropriate remedy for these violations.

6. The aforesaid violation affects commerce within the meaning of Section 2(6) and (7) of the Act.

7. Except as found herein, the other allegations of the Complaint are dismissed.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having concluded that the Respondent unlawfully discharged Mansfield Teetsel, it must offer him reinstatement, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F.W. Woolworth Co., 90 NLRB 289 (1950),* with interest at the rate prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010), enf'd denied on other grounds sub. nom., *Jackson Hospital Corp. v. NLRB,* 647 F. 3d 1137 (D.C. Cir. 2011). The Respondent shall also be required to expunge from its files any and all references to the unlawful discharge and to notify the employee in writing that this has been done and that the unlawful discharge will not be used against him in any way. The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. The Respondent shall also compensate Teetsel for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. *Latino Express, Inc.,* 359 NLRB No. 44 (2012).

In addition, as I have concluded that the Respondent has committed "hallmark" violations sufficient to make a fair and free election improbable, it shall be required to recognize and bargain with the Union in the following appropriate unit.

> All full-time and regular part-time drivers employed by Respondent at its West Coxsackie, New York location; excluding all guards and all professional employees and supervisors as defined in the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [7]

ORDER

The Respondent, Hogan Transports Inc., its officers, agents, and representatives, shall

1. Cease and desist from

a. Threatening employees with the loss of their jobs because they joined or assisted Teamsters Local 294, International Brotherhood of Teamsters.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

b. Promising and granting wage increases in order to dissuade employees from supporting the Union.

c. Interrogating employees about their union membership or support.

d. Discharging employees because of their union membership or support or for engaging in concerted protected activity protected by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

a. Within 14 days from the date of this Order, offer Mansfield Teetsel full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

b. Make Mansfield Teetsel whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.

c. Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Mansfield Teetsel, and within 3 days thereafter, notify him in writing that this has been done and that the unlawful actions will not be used against him in any way.

d. Recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative, retroactive to June 13, 2013, of employees in the above described appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

e. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

f. Within 14 days after service by the Region, post at its West Coxsackie facility copies of the attached Notice marked "Appendix B." [8] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 10, 2013.

g. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps Respondent has taken a comply.

Dated, Washington, D.C. February 26, 2014

_____
Raymond P. Green
Administrative Law Judge

APPENDIX A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

HOGAN TRANSPORTS, INC.

and **Case Nos. 03-CA-107189**
03-CA-111193

TEAMSTERS LOCAL 294,

AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS

and **Case No. 03-CA-108968**

MANSFIELD TEETSEL, an Individual

ORDER

On November 6, 2013, Administrative Law Judge Raymond P. Green ordered that Respondent submit to the undersigned for ruling documents that it claimed to be privileged as well as a privilege log. Judge Green also provided the General Counsel the opportunity to state objections or comments to the undersigned. General Counsel submitted his comments and objections, which I have carefully considered.

The attorney-client privilege protects communications between client and counsel, where such communications are made for the purpose of seeking or providing legal advice and are intended to be and are, in fact, kept confidential. *Upjohn Corp. V US., 449 U.S.,* 383, 398 (1981); *Fisher v. United States,* 425 U.S. 391, 403 (1976); *U.S. v. Construction Products Research, Inc.,* 73 F.3d 464, 473 (2nd Cir. 1996). The burden of establishing the existence of an attorney-client privilege in all its elements rests with the party asserting it. *US. v. Int. Bros. of Teamsters, AFL-CIO,* 119 F.3d 210, 214 (2nd Cir, 1997).

Documents sent from one corporate officer to another with a copy sent to an attorney do not automatically qualify, as attorney-client communications. *Simon v. G.D. Searle & Co.,* 816 F.2d 397, 403 (8" Cir. 1987); *United States Postal Service v. Phelps Dodge Refining Corp.,* 852 F.Supp.156, 163-164 (ED. New York 14994). The attorney-client privilege does not protect client communications that relate only business or technical data. *Simon v. G.D. Searle,* supra at 403; *SCM* v. *Xerox Corp.,* 70 F.R.D. 508, 515 (D. Conn 1978) ("legal departments are not citadels in which public business or technical information may be stored to defeat discovery and thereby ensure confidentiality").

While it is essential that communications between client and attorney concern legal assistance and advice in order to be privileged, it is not essential, however, that the request for advice be expressed. Client communications intended to keep the attorney apprised of continuing developments may be privileged if they embody an implied request for legal advice based thereon. *Simon v. G.D. Searle,* supra at 404; *Hercules v. Exxon Corp.,* 434 F. Supp 136 (D. Delaware 1977); *Jack Winter v. Kranton Co.,* 54 FRD 44, 46 (ND. California 1971).

I have attempted to reconcile the somewhat conflicting principles set forth in the above precedent to determine whether the commutations, here, from various officials of Respondent to each other with copies to its attorney or directly to its attorney, constitute business communications or communications impliedly requesting legal advice by keeping the attorney advised of business developments.

I am guided by *Patrick Cudahy Inc.,* 288 NLRB 968 (1988), where the Board applied these principles to documents involved in collective bargaining negotiations.

The Board reversed an ALJ, who had refused to recognize the attorney-client privilege, in part, because he viewed the nature of the work performed by the law firm as more in the nature of affording business assistance than rendering legal advice to the client. The Board disagreed, noting that the presence of business considerations intertwined with legal advice does not necessarily destroy the privileged nature of communications between attorney and client. 288 NLRB at 970. The Board further observed that the ALJ failed to recognize that "the process of collective bargaining invites the contributions of legal advice at all of its stages and that a primary purpose of the law firm's employment by Cudahy was to render legal advice throughout contract negotiations with the Union." Id at 971.

Therefore, the Board found, contrary to the judge, that the attorney-client privilege applied to advice rendered by the law firm in connection with negotiations and preparations for operations of the plant in the event of a strike. It further held consistent with *Upjohn,* supra and other cases that the privilege extends to the giving of information to the lawyer to enable him to give sound and informed advice. Id at 971.

I find the reasoning of *Patrick Cudahy* applicable to the instant matter. Here, it appears that Jon Bierman, Respondent's outside counsel, has been retained to represent it with respect to all matters relating to the organizing campaign by the Union at its facility in Coxsackie, New York. I conclude that such representation likely had business and economic aspects as well as legal aspects. Therefore, where the communications relate to matters involving the union campaigning and issues related to potential advice concerning Respondent's response thereto, the communications are privileged. Further, even though some of the communications do not expressly contain or seek legal advice, I find that most of the communications from Respondent's officials to each other and to its attorney represent "the giving of information to the lawyer to enable him to give sound and informed advice." Id at 971.

Accordingly, I conclude that the vast majority of the items included in the privilege log, which I have carefully examined, fall within the attorney-client privilege in that they either expressly relate to legal advice or are communications intended to keep the attorney apprised of business matters, which embody an "implied request for legal advice based thereon." *Simon v. G.D. Searle,* supra, 816 F.2d at 404.

General Counsel argues that Respondent acknowledges that some of the documents relate to the Union's organizing campaign and management's impressions and beliefs regarding employee support for the Union. Therefore, since such evidence concerning Respondents knowledge, beliefs or possible animus concerning employee support for the Union and their union activities is clearly relevant to the merits of the complaint, these documents must be produced. However, the fact that such information may be relevant to the allegations of the complaint does not end the inquiry. As I have explained above, the communications need not expressly request legal advice in order to become privileged as long as it embodies an implied request for advice based on the communications keeping the attorney apprised of business matters. Here, the privilege log and the underlying documents contain a number of communications, email attachments on various dates from Charlie Johnson, Respondent's director of operations, and David Stock, vice-president of dedicated operations, to each other and to Tom Lansing, vice-president of safety and driver servicers, with ccs to David Hogan, president of Respondent, and to Attorney Bierman. Tracey Miller, Respondent's director of recruitment and personnel, was also the recipient of some of these emails as was Jim Lauda, manager at the West Coxsackie, New York facility. The log states that the subject was "Albany Excelsior List: Updated," and relates to various dates in June and July of 2013. The log further states, under the column privilege, "attorney-client communications re revision to draft documents." These comments are not entirely clear since the official Excelsior list does not get updated (other than providing home addresses) over the course of the various dates involved in the communications. The updated "excelsior list" also contained information concerning the perceived union sympathies and voting intentions of each of the unit employees on the list on the various dates of the emails. While no legal advice is expressly asked for in these communications, it is reasonable to conclude, which I do, that this information was provided to counsel to enable him to give sound and informed legal advice. *Patrick Cudahy,* supra (i.e. advice on how to conduct Respondent's campaign in regard to the pending election).

I, therefore, conclude that these communications are all privileged and need not be disclosed, pursuant to the subpoena.

General Counsel also objects to the designation of the July 1, 2013 email, relating to "Manny Teetsel/Albany Not Leaving," as privileged, asserting that unless it seeks legal advice, it should be produced. This email is from Johnson to Stock, Lansing, Hooper and Bierman, and the subject is as related above. The privilege log states as a description "attorney-client communication re Teetsel matter." While this email does not expressly seek legal advice, it is a report detailing Respondent's notification of Teetsel's desire not to leave Respondent's employ, which in my view is privileged as a communication intended to keep the attorney apprised of business matters that embodies an implied request for legal advice based thereon." *Simon v. G.D. Searle,* supra; *Patrick Cudahy,* supra. Teetsel was terminated on July 6, 2013, and it is likely that Respondent's attorney provided legal advice concerning this action and that the facts communicated to the attorney in this email was considered and evaluated by him before providing such legal advice.

I have concluded based on the foregoing analysis and precedent that nearly all of the communications detailed in the privilege log were subject to the attorney-client privilege and need not be produced.

There are some exceptions, however, and they include the following items. Emails from Stock to Bierman, cc to Hogan, Lansing and Johnson and from Stock to Lauda, cc to Bierman, both dated June 29, 2013 with attachments as well as an email from Stock to Johnson and Lauda, cc to Bierman and Lansing, with attachments, dated July 16, 2013. These communications related to documents that were posted at the Coxsackie facility by Respondent, and the emails instructed the supervisors to post and distribute these items. While the attorney undoubtedly was involved in preparing or, at least, reviewing these documents before they were posted, they cannot be deemed privileged since they were not intended to be confidential. Indeed, the attachments were intended to and, in fact, were distributed to third parties (i.e. the employees), *U.S. v. White*, 970 F.2d 328, 334 (7th Cir. 1992). Therefore, there can be no privilege and these documents must be disclosed to General Counsel, pursuant to its subpoena.

Dated: New York, New York
December 6, 2013

Steven Fish,
Administrative Law Judge

APPENDIX B

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.
To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten employees with the loss of their jobs because they joined or assisted Teamsters Local 294, International Brotherhood of Teamsters.

WE WILL NOT promise or grant wage increases in order to dissuade our employees from supporting the Union.

WE WILL NOT interrogate our employees about their union membership or their support for the Union.

WE WILL NOT discharge employees because of their union membership or support.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the rights guaranteed them by Section 7 of the Act.

WE WILL offer Mansfield Teetsel full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Mansfield Teetsel whole for any loss of earnings and other benefits suffered as a result of the discrimination against him and we will remove from our files any reference to the unlawful discharge of Mansfield Teetsel, and within 3 days thereafter, notify him in writing that this has been done and that the unlawful actions will not be used against him in any way.

WE WILL recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative, retroactive to June 13, 2013, of employees in the appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

HOGAN TRANSPORTS, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Leo W. O'Brien Federal Building
Clinton Ave and N Pearl Street, Room 342
Albany, NY 12207-2350
Phone: (518) 431-4155

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER.